A

Public Prosecutor v Mohd Fadil bin Zainan

B

HIGH COURT (TAIPING) — CRIMINAL TRIAL NO AB-45B-2–06 OF 2018
MUNIANDY KANNYAPPAN J
12 FEBRUARY 2023

C

Criminal Law — Offences — Murder — Accused charged with offence of murder under s 302 of Penal Code — Domestic quarrel between accused and deceased — Deceased died two days after physical assault by accused — Whether elements of murder were established — Whether charge should be culpable homicide not amounting to murder — Penal Code ss 302 & 304

D

The accused was charged under s 302 of the Penal Code ('the PC') for killing his wife ('the deceased'). It was a case of domestic quarrel between the accused and the deceased. It all began when the deceased got a call from her friend named Man. The accused took umbrage over the call and wanted to snatch the handphone from her, sparking a struggle between the two of them witnessed by the deceased's friend and their son. The accused assaulted the deceased by beating, slapping, kicking, lacerating her with a broken cup and a cigarette lighter on to her face, hand and wrist. The deceased at one point of time went to wash her face and when she returned, the beating continued. The deceased fell on to the floor unconscious. As she was epileptic, she suffered seizures after the fall and she became totally unconscious until the next morning, when the accused had called for an ambulance to take her to the hospital. The accused also went to the police station to lodge a report as to what had befallen to his wife and surrendered himself to the police, as he had assaulted her continuously over the night. At the hospital, the deceased was attended to immediately with medication and was intubated. As there was no progress in her health, the doctors decided to remove her breathing aid. The deceased was pronounced dead two days after the incident. An autopsy found that the deceased died from head injury due to blunt force trauma.

E

F

G

H

Held, convicting the accused on a lesser charge of culpable homicide not amounting to murder under s 304(b) of the Penal Code and sentencing the accused to ten years imprisonment:

I

(1) The first, second and third element for the murder charge were established on a prima facie basis. However, the fourth element that the bodily injury inflicted was sufficient to cause death in the ordinary course of nature, was not established. Although the accused had kicked the deceased intentionally, there was no intention to strike the part of the

A body where the injury was found, ie on her head, and he had also no intention to strike with sufficient force to cause the kind of injury found to be present, to wit bleeding of the brains. The beatings on the deceased by the accused was obviously independent from the death which had taken place. The deceased did not die immediately because of the B beatings and hitting by the accused, but two days later (see paras 33, 37 & 39).

(2) In all probabilities and possibilities, the near cause of the death of the deceased, could have been the epileptic condition of the deceased and the stroke she had suffered. In the absence of a link between both, there C seemed to be a break in the chain of causation, thus negating criminality of the accused causing the death of his wife, the victim later deceased. In terms of mens rea, intention of the accused to kill his wife nor to cause bodily injury which was likely to cause the death of his wife was absent, from the time of infliction of the physical assaults by him, till she died D two days later. His actus reus was to have assaulted his wife persistently because of his constant anger that she was in communication with another man, although he was her husband, for which he remained criminally culpable, which would only attract the application of s 304(b) of the PC, for an offence of culpable homicide not amounting to murder E (see para 45).

(3) Pursuant to s 180(3) of the Criminal Procedure Code, a prima facie case had not been made out against the accused on the charge for an offence of murder. A prima facie case was made out against the accused on an F offence under s 304(b) of the PC and thus, the accused was called upon to enter on his defence on the amended charge for an offence under s 304(b) of the PC. The accused had pleaded guilty to the amended charge and was then convicted for an offence of culpable homicide not amounting to murder. The accused was sentenced to imprisonment for a G period of ten years (see paras 46, 48 & 50).

[Bahasa Malaysia summary

Tertuduh didakwa di bawah s 302 Kanun Keseksaan ('KK') kerana membunuh isterinya ('si mati'). Ia adalah kes pergaduhan rumah tangga antara tertuduh H dan si mati. Semuanya bermula apabila si mati mendapat panggilan daripada rakannya bernama Man. Tertuduh tersinggung dengan panggilan itu dan mahu merampas telefon bimbit daripadanya, mencetuskan pergelutan antara mereka berdua yang disaksikan oleh rakan si mati dan anak mereka. Tertuduh menyerang si mati dengan memukul, menampar, menendang, I mencederakannya dengan cawan pecah dan pemetik rokok di muka, tangan dan pergelangan tangan. Si mati pada satu ketika pergi mencuci muka dan apabila dia kembali, serangan berterusan. Si mati rebah ke lantai dalam keadaan tidak sedarkan diri. Memandangkan dia epilepsi, dia mengalami sawan selepas jatuh dan dia tidak sedarkan diri sehingga keesokan paginya,

apabila tertuduh telah menghubungi ambulans untuk membawanya ke hospital. Tertuduh juga pergi ke balai polis untuk membuat laporan tentang apa yang menimpa isterinya dan menyerahkan dirinya kepada polis, kerana dia telah menyerang isterinya secara berterusan sepanjang malam. Di hospital, si mati segera dirawat dengan ubat-ubatan dan telah diintubasi. Oleh kerana tiada kemajuan dalam kesihatannya, doktor memutuskan untuk mencabut bantuan pernafasannya. Si mati disahkan meninggal dunia dua hari selepas kejadian. Bedah siasat mendapati si mati meninggal dunia kerana kecederaan kepala akibat trauma daya tumpul.

Diputuskan, mensabitkan tertuduh dengan pertuduhan lebih ringan bagi kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang di bawah s 304(b) Kanun Keseksaan dan menghukum tertuduh penjara sepuluh tahun:

(1) Elemen pertama, kedua dan ketiga bagi pertuduhan membunuh telah dibuktikan atas dasar prima facie. Walau bagaimanapun, elemen keempat bahawa bencana tubuh yang dikenakan adalah cukup pada lazimnya bagi menyebabkan kematian, tidak dibuktikan. Walaupun tertuduh telah menendang si mati dengan sengaja, tidak ada niat untuk memukul bahagian badan di mana kecederaan ditemui, iaitu di kepala, dan dia juga tidak berniat untuk menyerang dengan kekerasan yang mencukupi untuk menyebabkan jenis kecederaan yang ditemui hadir, iaitu pendarahan otak. Pukulan ke atas si mati oleh tertuduh jelas berasingan daripada kematian yang telah berlaku. Si mati tidak mati serta merta kerana dipukul oleh tertuduh, tetapi dua hari kemudian (lihat perenggan 33, 37 & 39).

(2) Dalam semua kebarangkalian dan kemungkinan, punca kematian si mati, mungkin adalah keadaan epilepsi si mati dan strok yang dialaminya. Dengan ketiadaan kaitan antara kedua-duanya, terdapat pemutusan rantaian kausa, sekali gus menafikan jenayah tertuduh yang menyebabkan kematian isterinya, mangsa kemudiannya meninggal dunia. Dari segi mens rea, niat tertuduh untuk membunuh isterinya mahupun menyebabkan bencana tubuh yang berkemungkinan menyebabkan kematian isterinya adalah tiada, dari masa melakukan serangan fizikal olehnya, sehingga dia meninggal dunia dua hari kemudian. Actus reus nya adalah telah menyerang isterinya secara berterusan kerana kemarahannya yang berterusan kerana dia berkomunikasi dengan lelaki lain, walaupun dia adalah suaminya, yang mana dia tetap bersalah secara jenayah, yang hanya akan menarik penggunaan s 304(b) KK, untuk kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang (lihat perenggan 45).

(3) Menurut s 180(3) Kanun Tatacara Jenayah, kes prima facie tidak

dibuktikan terhadap tertuduh atas pertuduhan bagi kesalahan membunuh. Kes prima facie telah dibuktikan terhadap tertuduh atas kesalahan di bawah s 304(b) KK dan dengan itu, tertuduh telah dipanggil untuk membela diri atas pertuduhan pindaan bagi kesalahan di bawah s 304(b) KK. Tertuduh telah mengaku bersalah terhadap pertuduhan yang dipinda itu dan kemudian disabitkan dengan kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang. Tertuduh dijatuhkan hukuman penjara selama tempoh sepuluh tahun (lihat perenggan 46, 48 & 50).]

Cases referred to

Director of Public Prosecutions v Smith [1960] 3 All ER 161, HL (refd)
Kochee Muhammad Kunju Ismail v Mohammed Kadjaumma AIR (1959) Ker 151 (refd)
Leong Siong Sun & Anor v PP [1985] 2 CLJ 250, HC (folld)
Lang v Lang [1955] AC 402 (refd)
Oropesa, The [1943] P 32, CA (refd)
PP v James Tan [1983] 2 MLJ 173 (refd)
Mohamed Humayoon Shah v R (1874) 21 WR Co 72 (refd)
R v White [1910] 2 KB 124 (refd)
State of Andhra Pradesh v Rayavarapu Punnayya & Another 1976 4 SCC 382, SC (refd)
Whitehouse v Gay News Ltd [1979] AC 61, HL (refd)

Legislation referred to

Courts of Judicature Act 1964 s 18, 18(2)(a)(ii), (3)
Criminal Procedure Code ss 153(1), 158, 180(3), (4)
Evidence Act 1950 s 60(1)(a)
Penal Code ss 299, 300, 300(a), (b), (c), (d), 302, 304, 304(b), 325

Asrul Faidz Abdul Razak (with Sariza Ismail) (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
DC Ranjit Singh Sandhu (Ranjit Singh Sandhu & Co) for the accused.

Muniandy Kannyappan J:

PREFACE

[1] Accused, Mohd Fadil bin Zainan was charged under s 302 of the Penal Code (Act 574/PC) for killing his wife, Noor Waheedah bt Abdul Wahid on 11 January 2018 at about 8.30pm in their home at Np 49, Batu Matang, Matang Road, Taiping. The victim, his wife (deceased) did not die immediately, but later on 13 January 2018 at Hospital Raja Bainun, Ipoh. The charge against him reads:

Bahawa kamu pada 11 Januari 2018 jam lebih kurang 8.30 malam di alamat rumah

No. 49, Batu Matang, Matang Road, 34750, Taiping, di dalam Daerah Larut Matang, di dalam Negeri Perak Darul Ridzuan telah membunuh Noor Waheedah Binti Abd Wahid K/P: 800628-08-5528 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah seksyen 302 Kanun Keseksaan.

[2] The accused was 41 years old and worked at a cockle processing factory in Kuala Sepetang. He is married to the victim for about 15 years and has four children, all boys. The accused's mother, Fatimah bt Wahab testified to say that her son has mental health issues. He was admitted to the psychiatric ward at Taiping hospital and was later referred to Ipoh Hospital, but he never went for any follow up. Additionally, he did not consume medicinal drugs prescribed by the doctor. However, it is made known to the court there was no hospital card from the accused verifying this and he could also not remember if he has been treated at the hospital. On that premise, this court (before my predecessor), had decided for him to undergo psychiatric observation at Hospital Bahagia, Ulu Kinta, Perak for a month. Consequently, after a month, pursuant to a report issued by one Dr Saramah bt Mohd Isa, it is reported the accused is fit to stand trial.

ISSUES FOR DETERMINATION BY THIS COURT

[3] The primary issues to be decided in this case are:

(a) did the murder take place?

(b) did the accused commit murder?

(c) if it is murder, which limb of s 300 of the PC would it be? and

(d) if it is not murder, could it be culpable homicide not amounting to murder, an offence punishable under s 304 PC?

[4] Alongside, other issues which has to be considered are:

(a) is there credible evidence to prove accused did commit murder of deceased Noor Waheedah bt Abdul Wahid?

(b) was there a break in the chain of causation; as the victim did not die immediately after the beatings by accused but only two days later at the hospital?

(c) what is the effect of the medical evidence available, which do not point conclusively to the beatings by the accused on to his deceased wife that had caused her death but her medical condition?

(d) what is the ultimate cause of death of the deceased; is it the beatings by the accused or her medical condition; as she had suffered seizures and had also suffered a stroke?

(e) as such, is it an offence of murder which was committed by the accused; as it is borne out by testimony of witnesses that beatings by the accused did not cause the death of his wife?

(f) is the charge against accused, correctly framed, as the death of the deceased was not caused by the accused on 11 January 2018; but she died of epilepsy, followed by stroke on 13 January 2018? and

(g) would it be correct for the court to order for defence to be called on a lesser charge, for an offence of culpable homicide not amounting to murder punishable under s 304(b) of the PC as the evidence available does not fit in for an offence of murder punishable under s 302 of the PC?

TRIAL OF THE CASE

[5] The trial of this case had commenced before my predecessor, who had ceased jurisdiction to continue and conclude the proceeding against the accused. Since the case against the accused person was partly heard by my predecessor, I applied s 18 of the Courts of Judicature Act 1964 (Act 91). Section 18 of Act 91 renders the following:

> 18 Proceedings in High Court to be disposed of by a single Judge.
>
> (1) Every proceeding in the High Court and all business arising thereout shall, save as provided by any written law, be heard and disposed of before a single Judge.
>
> (2) Whenever any Judge, after having heard and recorded the whole or any part of the evidence in a proceeding, is unable through death, illness or other cause to conclude the proceeding, another Judge may —
>
> (a) continue with the proceeding from the stage at which the previous Judge left it and —
>
> (i) act on the evidence already recorded by the previous Judge; or
>
> (ii) act on the evidence partly recorded by the previous Judge and partly by himself; or
>
> (b) resummon the witnesses and recommence the proceeding.
>
> (3) Where the Judge acts under subparagraph 2(a)(i) he may, either on his volition or at the request of any party to the proceeding, recall any of the witnesses as in respect of any part of the evidence already recorded, or he may take their evidence afresh:
>
> Provided that in respect of a criminal proceeding, the Court of Appeal and the Federal Court may, on appeal, set aside any conviction had on the evidence not wholly recorded by the Judge before whom the conviction was had if such Court is of the opinion that the accused had been materially prejudiced thereby, and may order a new trial.

[6] In view of s 18(3) read together with s 18(2)(a)(ii) of Act 91, I had asked the deputy public prosecutor (DPP) and defence counsel (court-assigned) if they had objection for me to continue with the proceeding from the stage where my predecessor left and to also act on the evidence already recorded by him. Both had agreed for me to continue with the trial, without any qualification or reservation.

THE EPISODE AND TESTIMONY OF WITNESSES

[7] The entire episode in this case was triggered by a scuffle over a handphone. It all began when the victim got a call from her friend named Man. Accused took umbrage over the call and wanted to snatch the handphone from her, sparking a struggle between the two of them witnessed by victim's friend SP1, and their son Muhammad Ismail, SP7. The fight involved pushing and shoving each other and did not stop outside the house; more intense fighting occurred inside the house. It only stopped when the victim fell unconscious later in the night.

[8] First witness for the case is, SP1 Nurul Hayanti Rusnani, a friend of the victim. She also knew the accused as she lived closed by their home and became friends with the victim when she got married and moved to that residential area at Kg Matang Road.

[9] According to her, the victim had told her of her marital problems with accused, and wanted her to accompany her to the religious department. However, she did not do so, as she was busy. Apparently, a few days later the victim had told SP1, she went to the religious department on her own and had filed a petition to divorce the accused. Nonetheless, this claim is unverified and left as it is, without any further probe by parties.

[10] She continued her testimony, and told the court she went to victim's house on the day of fight, and had a chat with the victim, who had told her that she befriended a man by the name of Man. She then told SP1, she wanted to make a call to him and went out of the house. After a while, SP1 heard arguments from the outside and both victim and accused were in a tussle, whereby the accused was trying to grab the handphone from the victim. He managed to get hold of the handphone, but the victim was trying to get it back from him. She also saw the accused pushing and hitting the victim. The accused had then, passed over the handphone to his son, Muhammad Ismail.

[11] She went on to testify, both the accused and victim continued to fight. The accused had even hurled accusation against SP1 for leading his wife, the victim, astray by having a relationship with another man. SP1 had denied it and the accused had then told her to go home. Before she left, she saw the

accused hitting and pushing the victim against the wall. She added, the accused had a stick in his hand. When cross-examined by the defence counsel (DC), as what she did at that time, her reply was she and a few other neighbours had tried to stop the fight between the accused and victim. On another note, she also agreed with the DC, cause of fight was the third party, Man, and the problem arose because the accused was riled up with the victim, as she had a telephone conversation with Man that evening.

[12] Another witness who had testified was SP3 Mohd Zilali bin Mohd Din, a school teacher and neighbour. He heard a commotion, the accused raising his voice to his wife, outside their home. He went over to ask the accused's son, Muhammad Ismail, as to what was the commotion all about, but he did not get any reply from the boy. He then went into his own house. Later in the night, he heard arguments, but he did not pay too much attention to it, as such arguments have taken place before. Next morning, when he left for work, the accused's house was dark, and he came to know of his wife admitted to the hospital, a day later.

[13] Witness SP7, Muhammad Ismail bin Mohd Fadil is the couple's eldest son, and was 16 years old at time of testimony. Although he was below 18 years old at point of testimony, but he was able to understand the sanctity and effect of the oath taken before he started his testimony and he is intelligent enough to appreciate all questions asked to him and able to answer it, pointedly and fluently. He told the court he was informed of the incident by a friend. On learning this, he rushed home and found his parents in a struggle over a handphone. He tried to stop them and his father, the accused, told him to get the phone from his mother. His father also told him that someone was trying to call his mother. SP7 managed to get the phone and called the person who was calling his mother, the call was answered, but later put off. He tried calling again, but there was no response. He had remarked his mother had sent a message on the phone to meet Man but it was later deleted. SP7 went on to tell the court, somehow, he managed to prevent his parents from fighting. Later, his parents went inside the house and the struggle continued with his father beating, punching and slapping his mother repeatedly on her face, body, hands and legs. It continued and he could not stop them. When his brothers, Muhammad Ilyas and Muhammad Ali came back home and tried to stop the fight, they were also unable to do so. His father continued to beat his mother and had used a broken blue plastic cup to lacerate his mother. After that, he continued to use a cigarette lighter. Then he testified, his mother got up and went to the sink to wash her face. She then moved to the front and the beating continued with his mother beaten on the face, body, hands and legs. His father continued beating and stepped on her stomach. He had used his legs to forcibly kick his mother. SP7 had used the word *terajang* to describe this, in his testimony.

[14] SP7 then told the court, his mother suddenly suffered a seizure and slumped on a chair. His father continued to beat her for about five minutes after that. He said the fight continued until about 11pm. His mother was lying down and half-conscious by that time. His father stopped the beating when his mother fell unconscious. His father then told Muhammad Ilyas and Muhammad Ali to go to sleep, as they were schooling, the next day. SP7 then went out to the shop to buy cigarettes for his father. When he came back from the shop, he saw his mother lying on the floor, unconscious. The next morning, he tried to wake his mother up but there was no response from her. His father told him to go to school. When he got home after school, his grandmother told him that his mother had been taken to the hospital by an ambulance. He went to Taiping Hospital that evening but was told his mother had been sent to Ipoh Hospital. His uncle, Haris (SP2) then took him and his brothers to Ipoh. At Ipoh Hospital, he said, his mother was unconscious and had a lot of bruises on her body. He told the court his mother died three days later; he was unsure if it was 14 or 15 January 2018.

[15] SP7 had informed the court, his mother had a history of seizures and had two to three attacks in a month. He related that when she had seizure, she would fall and hit the floor. She had suffered head and elbow injuries before, when she had seizures. Each seizure episode lasted for about ten minutes. After the attack, she would get up but would be in a daze and would be unable to recognise people around her. According to him, she was on medication for epilepsy.

[16] SP2, Harris bin Abdul Wahid, brother of the victim, narrated to the court that he visited his sister at Ipoh Hospital. He told the court, victim was in a serious condition; she was on a breathing machine and her face was swollen. After that he proceeded to make a police report. He was also at the hospital after the post mortem for purpose of identification. Despite her serious injuries, he had no knowledge of what actually happened to his sister.

THE AFTERMATH

[17] Investigation by the police into the case commenced under s 325 of the PC. SP6, Inspector Chee Cia Cia of the Women and Children Sexual Offences Unit at Taiping Police Headquarters (IPD) arrested the accused, when he came in to report the incident on 12 January 2018 and surrender himself. His report is tendered and marked as D1. Her task included recording statements from SP1 and the doctor who confirmed death of the victim.

[18] The case was then handed over to ASP Sivakumar a/l Saminathan (SP11), also an Investigation officer (IO) at IPD Taiping when the victim died on 13 January 2018. When he started investigation, he contacted Mr Manjit,

a forensic officer at Ipoh Hospital to obtain confirmation on the post mortem of the deceased victim. ASP Sivakumar was present at the post mortem and had received the forensic samples from the pathologist. He also visited the accused's house with SP4 Inspector Simon a/l Vadivelu, IO from the Forensics Department. SP4 carried out a forensic search at the site. He examined the house two days after the incident and made an analysis of the living room floor, but no specimen was found. The rooms in the house were in disarray. SP4 collected what appeared to be some kind of liquid that looked like blood. However, on using an equipment, hemesensor, no traces of blood were found. ASP Sivakumar recorded statements from three witnesses, who are SP7 and his brothers Muhammad Ilyas bin Mohd Fadil and Muhammad Ali bin Mohd Fadil. SP7 had informed the IO, two items were still in the house, thus on 15 January 2018, he went to the house and obtained a yellow Nokia mobile handphone and a broken blue plastic cup. He reported that blood samples of the accused and deceased; right and left fingernails of the deceased; the broken plastic cup were sent for analysis to the Chemistry Department, Penang.

[19] The chemist, Jacqueline Bernice John Bosco (SP10) reported to the court there was no anomalous findings from the samples given by the police. In other words, there was no foreign DNA found from the deceased finger nails.

[20] In the course of police investigation, the IO checked the handphone for ownership and SIM card details. He traced the call that was received by the victim, to a man called Rohim, a Bangladeshi with passport number 610952. He was untraceable and the SIM card was inactive too. Subsequent checks were made with the Immigration Department, but no movement could be traced to Rohim. There was a letter from the Immigration to verify this.

MEDICAL EVIDENCE

[21] Moving on to the medical evidence, the main points on testimonies of doctors who had treated the victim are the following:

(a) first up is SP13 Chai Kean Chung, Doctor at A & E, Hospital Taiping. Dr Chai recounted the victim was admitted to A & E Taiping Hospital at 9.37am on 12 January 2018. Dr Chai said the victim was brought in a state of reduced consciousness. He noted the victim had bruises on her face and she was intubated for airway protection. Dr Chai examined the patient and requested for a CT scan to be done. The CT scan showed bleeding in the head and the patient was then referred to the surgical and anaesthetic teams. Medication was given to the patient as prescribed by the surgical doctor: four types of medicine were given to prevent bleeding, swelling of the brain, epilepsy and gastric ulcer. He had testified, one Dr Kamine from the anaesthetic team had examined the victim only after 2.5 hours, at about 2.30pm, although victim was

referred to the team much earlier by him. He was unable testify on reason for the delay. The victim was then transferred to Ipoh Hospital at 3.30pm on the same day escorted by Dr Kamal from the surgical team. He did not know if the victim had suffered a stroke and was unsure who had taken the history of the patient when she was admitted to hospital. SP13 was aware that the victim had suffered epilepsy when she was brought in to the hospital, but could not confirm if that was the cause for bleeding in the head. However, he did not deny that epilepsy would have had an effect on the victim's brains. His report was tendered and marked as exh D3;

(b) at Hospital Bainun, Ipoh, Dr Yap Yi Wei (SP12) was on duty at the A & E Department. Dr Yap said the patient was brought in unresponsive and intubated. He confirmed victim's heart rate and blood pressure reading was normal, at that point of time. Based on examination and CT scan report, SP12 was aware the patient had brain injuries and was later admitted to ICU. Further, he said the patient's infractions, which are injuries to cell tissues was as a result of failure of blood supply. It is also confirmed the multiple areas of infraction are unlikely to be old. Dr Yap added there was evidence of a stroke. As the patient's prognosis was poor and after discussion with a neurosurgeon, one Dr Jason, the patient was reassessed. As there was no improvement in her condition, she was withdrawn from further life support therapy. She passed away after that. Dr Yap was unable to say if the epilepsy attack happened before or after she sustained the injuries. When pressed on, if it could contribute to her death, the doctor replied that cause of death was determined in the post mortem report. However, he confirmed the stroke suffered by the victim, could have been a contributing factor to her death; and

(c) post mortem was carried out by forensic expert Dr Mohammad Shafie bin Othman @Osman (SP8). He began by saying outwardly, the bruises on the body were caused by blunt and hard objects; punches and kicks may also cause such bruises. Internally, there was bleeding in the head and lungs showed spots of bleeding. The injuries to the outer skin layer of the head and face — probably pointed to the deceased getting hit repeatedly. He also commented that the injuries (bruises and scratch marks) to her hands and wrists were consistent with injuries sustained while a person was in a physical struggle with another person, or trying to defend oneself. He also agreed with DC that it was probable that the deceased suffered from a seizure, and fell on to the floor. However, the nature and distribution of some of her injuries, such as injury to the back of her head, on the cheeks, below the chin and on the wrists, were not caused by a fall on the floor. The expert concluded the cause of death was head injury from blunt trauma. The doctor added the he did not know if the deceased had other disease(s) that could have been attributed to her death. However, in his view if the deceased had had epilepsy at the

time of scuffle and had fallen down, then there is a possibility for injuries to her head, caused by the fall on to the floor. This according to him would be the injuries caused by blunt trauma. The post mortem report was tendered and marked as P13.

IN SUM TOTAL

[22] In sum total, it was a case of domestic quarrel between husband and wife, triggered by the presence of a third-party Man/Rohim in the romantic life of the victim, which ended horribly with her death. Evidently, the accused had beaten his wife in a terrifying manner. Clearly, the accused was incensed when he knew that his wife was in communication with another man. The handphone conversation between his wife and Rohim threw the accused into a rage which resulted in him trying to snatch his wife's handphone. The struggle that ensued escalated into a dastardly fight between the couple witnessed by their neighbour and children. The triangulation of testimonies from Nurul Hayanti (SP1), Muhammad Ismail (SP7) and Mohd Zilali bin Mohd Din (SP3) decidedly led to the fact that an argument and fight did occur on that fateful day. The undisputed medical evidence also left no doubt that the victim suffered serious bodily injuries from the physical altercation. Obviously, the accused got into a rage when he found out that his wife was unfaithful to him. After all, they were married for about 15 years and perhaps cheating by his wife shook him to the core, which made him lose all manner of balance and rationality. The unabated and uncontrolled anger was taken out on his wife. He has, no doubt, paid a hefty price for his behaviour — the loss of his wife in the most harrowing of consequences.

[23] She was taken to hospital and pronounced dead only two days later. An autopsy found that the victim died from head injury due to blunt force trauma. The accused was then charged and faced trial for murder of his wife. He was accused of killing his wife through assaults on her on 11 January 2018, because he had hit her multiple times in the face, hand, wrist, legs and kicked her while she lay on the floor. She had suffered extensive injuries.

[24] The prosecution had argued that it is the continuous beating that had caused the death of the victim. The defence on the other hand, contended that the victim's epilepsy and stroke could be the cause of death. Moreover, the medical evidence available did not rule out such a notion.

INTENTION OF THE ACCUSED

[25] In law, for an offence of murder under s 300 of the PC, the act can be the actual physical act of killing resulting in death or the act of causing such bodily injury as is known to be likely to cause death or sufficient in the ordinary course

of nature to cause death or is known to be so imminently dangerous that it must in all probability cause death.

[26] It must be emphasised however, that there can be no criminal liability unless the whole of the actus reus is proved. In *R v White* [1910] 2 KB 124 for instance the accused put potassium of cyanide in his mother's drink, intending to kill her. Shortly afterwards, the mother was found dead with the glass, partly full beside her. Medical evidence confirmed that death was due to a heart attack and not poisoning, the amount of potassium cyanide administered was insufficient to cause her death. The accused was only convicted of attempted murder, although death occurred was not caused by his conduct and thus an element of the actus reus of murder was missing.

[27] Under the Penal Code, the offence of murder is defined and the definition states not only what the accused must have done, but the state of his mind with regard to the act when he was doing it. It must have been done intentionally, knowingly (see by analogy: *Kochee Muhammad Kunju Ismail v Mohammed Kadjaumma* AIR (1959) Ker 151).

[28] What then is intention? It is the purpose or design with which an act is done. It is the fore-knowledge of the act, coupled with the desire of it; such fore-knowledge and desire being the cause of the act, is as much as they fulfil themselves through the operation of the will. An act is intentional if, and in so far as it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied (see: *Lang v Lang* [1955] AC 402).

[29] Clearly, intent resolves itself into two things: foresight that certain consequences will follow from an act, and the motive for those consequences which induces the act. In other words, an act may be intentional with respect to circumstances as well as consequences. Intention here means either hope that the circumstances exists (which corresponds to purpose in relation to consequences) or knowledge that the circumstances exist (which corresponds to foresight of certainty in relation to consequences) (see: *Criminal Law of Malaysia & Singapore Principles of Liability,* Molly Cheang, Professional Law Books Publishers, 1990, at p 22). Lord Diplock in *Whitehouse v Gay News Ltd* [1979] AC 61, observed:

> No distinction was to be drawn in law between the state of mind of one who did an act because he desired it to produce that particular result and the state of mind of one who when he did the act, was aware that it was likely to produce that result but was prepared to take that risk that it might do so, in order to achieve some other purpose which provided this motive for doing what he did. It is by now settled law that both states of mind constitute 'intention' in the sense in which that expression is used in the definition of a crime whether at common law or in a statute. Any

doubts on this matter were finally laid to rest by the decision of this House in *R v Hyam* [1975] AC 55.

Molly Cheang went on to say, an examination of the type of offence in which intention to bring a forbidden consequence(s) is the requisite mens rea ought to be considered.

[30] Under the common law the offence of murder is one generally requiring intention. Similarly, the offence of murder as defined by s 300 of the Penal Code requires intention. Specifically, the mens rea required is the intention to cause the death (limb (a) to s 300) of the person killed, or that of some person; or the intention to cause such bodily injury as the offender knows to be likely to cause death (limb (b)); or the intention to cause such bodily injury and intending that bodily injury to be sufficient in the ordinary course of nature to cause death (limb (c)); or when the doer knows that his act is imminently dangerous that it must in all probability cause death (limb (d)). It must be noted however that the Penal Code makes a distinction between murder punishable with death and culpable homicide not amounting to murder which is not punishable with death.

[31] Hence, intention of causing death is among the types of intent required for the offence of murder and it is a subjective matter. It is a state of mind, which cannot be proved as a fact; it can only be inferred from facts which are proved (see: *Director of Public Prosecutions v Smith* [1960] 3 All ER 161).

[32] Section 299 PC defines the offence of culpable homicide and s 300 provides that murder is a form of culpable homicide. The only punishment for murder is death; for culpable homicide not amounting to murder, the maximum penalty is life imprisonment or ten years depending on the mens rea of the accused.

[33] Thus, it is settled law, that for a murder charge to be made out, the prosecution had to prove four elements: The presence of a bodily injury, the nature of the injury, the injury was intentionally inflicted and the injury must be sufficient to cause death in the ordinary course of nature. Applying the above principle of law, to the facts and circumstances of the present case, it is apparent that the first, second and third element were established, on a prima facie basis. However, I am not satisfied that the fourth element that the bodily injury inflicted was sufficient to cause death in the ordinary course of nature, was established.

[34] Actions of the accused during the incident only show he was immensely angry over the handphone incident and he kept on hitting, kicking, lacerating and slapping the victim. He was reacting angrily, and the physical assaults

happened to what was in front of him, which happened to be the victim's different parts of the body. But the repeated beating, slapping, kicking did not include the head of the victim. SP7 who saw the entire incident had testified what he saw on that night until the victim became unconscious, then she had suffered a seizure, due to epilepsy. He had only seen his father beat, punched and slapped his mother repeatedly on her face, body, hands and legs. He never said the mother was hit on her head. He did testify to say, during the scuffle, the victim was only pushed with her head. SP1, friend of his mother had said the accused had hit on her head with his hand only once. As between SP1 and SP7, the testimony of SP7 has greater probative value, as he was present at the scene of incident throughout. He cannot be lying, as he is the son of the victim. Moreover, he comes across as an honest witness who was willing to testify against his own father who was facing a death penalty charge. His testimony falls squarely within s 60(1)(a) of the Evidence Act 1950 (Act 56), since he narrated what he saw with his own eyes, happening to his mother. Opposed to SP7, SP1 was there at the home of the victim for a short while when the struggle with the accused took place and she was then asked to leave by the accused. She happened to be there by chance, and seems to have been a little biased, as she had heard lots of adverse stories about the accused from the victim before she died, starting from divorce then to the issue of her boyfriend. Her observation of what was happening to the victim, was only a fleeting one and she did not observe the entire incident that had befallen the victim. Conversely, SP7 was present throughout to protect and prevent both his parents from continuing to quarrel, fight and struggle.

[35] The action of the accused taking the victim to the hospital after she became unconscious operates in his favour as it corroborates the fact the accused had actually no intention to kill her, but to only teach her a lesson, unfortunately by physically assaulting her. He was overwhelmed by anger, after suspecting his wife had been unfaithful to him. With that, he lost his sense of realising his beating and lacerating had in fact injured and bruised his wife's body badly, but not her head. His immediate action of lodging a police report D1, on 12 January 2018 and surrendering himself to the police, is a conduct inconsistent with a person who wants to kill his wife, or even to hide away from the ghastly incident. When he lodged the police report and surrendered to the police, he must have been remorseful. But of course, that does not exculpate him from criminal culpability totally. The pivotal issue, is he directly responsible for the death of his wife?

[36] It is a proven fact that the victim did not die immediately as a result of the repeated beating, slapping and kicking by the accused. It is also apparent, after the repeated beating, slapping and kicking, the victim fell down to the floor unconscious and she had suffered a seizure. She was taken to the hospital much later for treatment. At the hospital, there seems to have some delay by the

anaesthetic team to attend to her immediately, as testified by SP13. Sequentially, there has been a series of development on the condition of the victim when she was brought to the hospital:

(a) brought in a reduced state of consciousness;

(b) her pulse rate and blood pressure reading were normal;

(c) she had suffered a stroke;

(d) she was an epileptic patient and under medication; and

(e) she did not die naturally, but only when the breathing aid was removed from her by the doctors at the hospital. It was withdrawn as it was opined by SP12 as well as the neurosurgeon, that prognosis showed, victim was not responding positively, thus probability of the victim regaining consciousness was low. This is confirmed by SP12.

[37] Thus, although accused had kicked the victim intentionally, there was no intention to strike the part of the body where the injury was found, ie on her head, and he had also no intention to strike with sufficient force to cause the kind of injury found to be present, to wit bleeding of the brains. As alluded to above, she could have died because of other contributing events that had taken place medically on her and the circumstances she was in, at both the hospital. As a result of the tireless beating, she went unconscious. She was not a healthy person, as she had epilepsy and had suffered seizures. It cannot be ruled out that epilepsy would have contributed to her death. Medically too, this was not ruled out by SP12 from the Ipoh Hospital, where the victim finally died.

[38] In a criminal case, there cannot be any doubt on the actus reus or mens rea at the end of the case of prosecution. There has to be only credible and believable evidence which is free from reasonable doubt. Any form of doubt or uncertainty would rest in favour of the accused. Thus, the injuries that resulted from the physical assault by the accused on to the victim must also be the cause of her death.

[39] In the present case, it seems the beatings on the victim by the accused is obviously independent from the death which had taken place. This is fortified by the stark fact, she did not die immediately because of the beatings and hitting by the accused, but two days later. The death too had taken place as the breathing aid or life support therapy was removed by the doctors who had treated her, as there was no progress in her health condition. Evidence adduced also shows, her family members were not consulted, before them doing so.

CAUSATION

[40] On the question of causation in murder and culpable homicide, His Lordship, as he was then, Peh Swee Chin J (later judge of the Supreme Court) in the case of *Leong Siong Sun & Anor v Public Prosecutor* [1985] 2 CLJ 250 approved the test provided by Lord Wright in *The Oropesa* [1943] P 32, which is the following:

> To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, *a new cause which disturbs the sequence of events,* something which can be described as either unreasonable or extraneous or extrinsic. (Emphasis added.)

The decision in the case of *Leong Siong Sun & Anor v Public Prosecutor* is instructive and relevant to the present case. In that case the deceased was admitted to hospital for treatment to a lacerated wound on the arm and swelling of the abdomen. It turned out that his intestines were ruptured. He left hospital of his own accord after treatment but without being operated on. His Lordship decided the following:

> The deceased had died of peritonitis, ie the infection and inflammation of the membrane which lines the cavity of the abdomen, brought about undoubtedly by the rupture of the intestine which was obviously not treated by surgery. In these circumstances, could the appellants be convicted of causing the death of the deceased as opposed to merely causing grievous bodily harm to him? Learned counsel has submitted for the appellants that the cause of death of the deceased was the failure for the deceased to be treated properly and the deceased's own negligence in discharging himself. I am fairly certain that if the deceased had been told that if he discharged himself without surgery to repair the rupture of the intestine he would have faced a very likely death; the deceased would have practically begged for the surgery and discarded any intention to discharge himself from the hospital.
>
> To revert to the learned counsel's submission that the cause of death was the failure on the part of the deceased to be treated properly, the case of *R v Smith* [1959] 2 QB 35, is pertinent. In the course of judgment, Lord Parker CJ laid down a test as follows:
>
> *It seems to the Court that, if at the time of death, the original wound is till an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting which another cause operates can it be said that the death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.*
>
> Here in this case I am unable to say that the rupture of the intestine was not the operating and substantial cause of death, neither I am able to say that the failure to operate on the deceased was so overwhelming a cause of death as to make the rupture of the intestine merely a part of the history. (Emphasis added.)

ANALYSIS AND FINDINGS

[41] Analysing the evidence available in its entirety, it can be concluded there was a domestic quarrel between the accused and his wife, the victim later deceased. It started because the accused wanted to view her handphone, as he became suspicious as she was speaking on the phone with another man. The accused was curious to know who that man was, but the victim did not want to let him have the handphone, so a scuffle took place. Finally, the handphone was taken away from the victim by their son SP7, who had tried to call the man on the other side on the instruction of accused, but to no avail as although the recipient of the call answered but he had discontinued the call.

[42] The accused was incensed with the victim thereon, and he continued assaulting her by beating, slapping, kicking, lacerating her with a broken cup and a cigarrete lighter on to her face, hand, wrist, but not her head. The victim at one point of time went to wash her face and when she returned, she fell on to the floor unconscious. So, there is the possibility when she fell on to the floor, her head would have touched the hard surface, thus causing injuries to her head. But there is no evidence from SP1 or SP7 that the accused had hit the victim's head continuously unlike other parts of her body. As she is epileptic, she suffered seizures after the fall and she became totally unconscious until the next morning, when the accused had called for an ambulance to take her to the hospital.

[43] Responsibly, the accused had gone to the police station to lodge a report as to what had befallen to his wife and surrendered himself to the police, as he had assaulted her continuously over the night. He was candid to the police. Resulting from that he was arrested and remanded for causing grievous hurt to his wife under s 325 of the PC. It was so, because as a result of the assaults, the victim was bruised and injured but she did not die.

[44] When the victim arrived at the hospital, she was in a reduced state of consciousness, which tallies with her condition when she went unconscious after all the physical assaults on her by the accused the night before. The doctors at both Taiping and Ipoh Hospital, found that she had suffered epilepsy and a stroke due to bleeding in her head cum brains. Due to that she was attended to immediately with medication and was intubated, as there was no flow of oxygen to her brains, and due to the stroke, she had suffered there was infraction and death of cell tissues in her brain. She was also seen with lots of bruises on her body. At Ipoh Hospital, as there was no progress in her health, the doctors decided to remove her breathing aid, after which she passed away. So, the injuries suffered by her do not seem to be the operating or substantial cause or *causa causans* of her death for the following reasons:

(a) after the continuous physical assaults on her, she was still conscious, as she had gone to the sink to wash her face;

(b) when she came back after washing her face, she fell on to the floor unconscious, until the next morning when she was taken to the hospital;

(c) by then she had already suffered seizures due to epilepsy and also a stroke. It is borne out by the fact that she went into the hospital with reduced consciousness, thus not fully unconscious;

(d) her pulse rate and blood pressure reading were normal.

(e) as she was lacking oxygen to her brains due to the stroke, she was given medication and was intubated;

(f) the anaesthetist took a long time to arrive and attend to her. Hence, there was lapse of time, as she was not attended to immediately, although it had to be so, since she came into the hospital with a serious condition;

(g) at the Ipoh Hospital she died because her breathing aid was removed by the doctors, and not because she was not responding to any other alternative form of treatment or medication. It seems to be an exercise of judgment by the doctors, without consulting victim's family members, including her husband, the accused person and her brother SP2;

(h) consistently, the post mortem conducted on her, reveals she had died of bleeding in her brains and not because of the bruises on her body caused by the assault on her;

(i) undoubtedly the accused had inflicted the bruises and injuries on the victim's parts of the body, but not her head, but when she fell unconscious on to the floor, she could have injured her head, which could have possibly led to the bleeding in her head cum brains;

(j) this was not ruled out by SP8, the pathologist, who had agreed with the DC, that it was probable that the deceased suffered from a seizure, fell on the floor. He concluded the cause of death was head injury from blunt trauma and added he did not know if the deceased had other disease(s) that could have been attributed to her death. However, in his view if the deceased had had epilepsy at the time of scuffle and had fallen down, then there is a possibility for injuries to her head, caused by the fall on to the floor. This according to him would be the injuries caused by blunt trauma;

(k) so, did SP12 from the Ipoh Hospital who had testified on the extent of damage that could be caused due to epilepsy and stroke;

(l) hence, in all probabilities, her death is due to the epilepsy and stroke she had suffered. There is also no conclusive medical evidence showing the epilepsy and stroke were caused by the physical assaults by the accused on to her;

(m) in fact, the doctor who attended to her at Ipoh Hospital did not rule out the possibility of her epileptic condition causing the stroke, so did the pathologist SP8;

(n) the pathologist's finding is made without him having any knowledge that the victim had suffered seizures and a stroke;

(o) thus, there is no nexus demonstrated vide medical evidence between the physical assaults inflicted by the accused on to the victim's body with the epilepsy, stroke and her ultimate death; and

(p) therefore, the second cause pertaining epilepsy and stroke, is so overwhelming that renders the original wound and bruises caused by physical assault by the accused merely part of the history. The death of victim does not flow from the wound and bruises caused by the physical assault on her by the accused.

[45] As the accused faced a criminal charge, the burden of proof is on the prosecution to prove its case against the accused, beyond reasonable doubt and the court is no position to decide purely on surmise or conjecture. Incidentally, the prosecution in this case took a simple approach by adopting a theory, the bruises and injuries on the body of victim, which was inflicted by the accused must have led her to have suffered seizures and later a stroke and finally her death. But this theory of the prosecution is unsubstantiated with expert medical evidence, which had remained inconclusive but not ruling out the possibility of the death because of the stroke. As to whether the seizures and stroke was caused by the physical assaults on her by the accused, is not made known to the court conclusively. Missing is also direct or circumstantial evidence pointing towards injuries on the head of victim by the accused, which may have caused the seizure and stroke. Hence, in the absence of expert medical evidence, left is only physical assaults by the accused which had bruised and injured the victim on one hand and the seizure, bleeding of her brains and stroke which may have led to the death of the victim on the other hand. Both are not related to each other, but seems to stand independent of each other. Thus, in all probabilities and possibilities, the near cause of the death of the victim, could have been the epileptic condition of the victim and the stroke she had suffered. In the absence of a link between both, there seems to be a break in the chain of causation, thus negating criminality of the accused causing death of his wife, the victim later deceased. In terms of mens rea, intention of the accused to kill his wife nor to cause bodily injury which is likely to cause the death of his wife is absent, from the time of infliction of the physical assaults by him, till she died two days later. His actus reus is to have assaulted his wife

persistently because of his constant anger that she was in communication with another man, although he was her husband, for which he remains criminally culpable, which would only attract the application of s 304(b) of the PC, for an offence of culpable homicide not amounting to murder.

CONCLUSION

[46] On a maximum evaluation of the evidence adduced by prosecution to support a charge for an offence of murder against the accused under s 302 of the PC, which extends to credibility of the prosecution witnesses who had testified during the trial, including testimonies of SP7 (son of accused), SP12 and SP13 (doctors) considered cumulatively together with testimony of SP8 (pathologist) and reliability of their evidence, this court finds that pursuant to s 180(3) of the Criminal Procedure Code (CPC/Act 593), a prima facie case has not been made out against the accused on the charge for an offence of murder.

[47] It is trite law that the difference between murder and culpable homicide is intention. If the intention is present the crime is said to be committed under s 300 PC if the intention is absent, then the crime is dealt under s 304 of the PC. It is also a fact that all murders are culpable homicide but not vice versa. Speaking generally culpable homicide sans special characteristics of murder is culpable homicide not amounting to murder (see: *State of Andhra Pradesh v Rayavarapu Punnayya & Another* 1976 4 SCC 382). Being a question of fact, after analysing and interpreting the evidence tendered by the prosecution in this case, it is deciphered that intention of the accused when he inflicted physical assaults on his wife was merely to cause bodily injury which does not constitute an offence of murder.

[48] Ensuing from that, premised on the same evidence proffered by the prosecution a prima facie case is made out against the accused on an offence under s 304(b) of the PC which this court is competent to try and which in the opinion of this court, it ought to try. The prosecution has been successful, pursuant to s 180(4) of the CPC, adduced credible evidence proving each ingredient of the offence under s 304(b) of the PC, which if unrebutted or unexplained would warrant a conviction. Section 304(b) of the PC reads:

> Whoever commits culpable homicide not amounting to murder shall be punished —
>
> (b) with imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

The limb relied on is 'to cause such bodily injury as is likely to cause death' without an intention to cause death. Thus, the accused was called upon to enter

on his defence on the amended charge for an offence under s 304(b) of the PC.

[49] The order of this court after conclusion of case for prosecution, to call upon the accused to enter on his defence to an amended charge under s 304(b) of the PC has in fact retrieved the case of the prosecution, which was premised on a charge of murder punishable under s 302 of the PC. A point noteworthy is on the date of offence stated in the charge, which is 11 January 2018. As narrated and confirmed by evidence proffered by the prosecution in this case, the victim did not die immediately on 11 January 2018 but only two days later on 13 January 2018. This would go to show that the charge preferred against the accused is incorrect, as on 11 January 2018 the accused could not have possibly committed murder as alleged, when his wife, the victim did not die on that day but only two days later at the hospital. What had transpired on that date, is only physical assaults by the accused on his wife. The prosecution too did not take any steps to amend the date stated on the charge, thus leaving it as it is. But obviously, from the analysis and finding made by this court, the offence committed on 11 January 2018 is only culpable homicide not amounting to murder which is now disclosed in the amended charge (P29). It cannot be gainsaid, charge against the accused is pivotal and fundamental and it notifies the accused of the matter with which he is charged and for him to adequately prepare his defence as available under the law (see: s 153(1) of the CPC). The charge preferred would also guide the court trying the accused of the matters to which evidence is to be marshalled and directed (see: *Mohamed Humayoon Shah v R* (1874) 21 WR Co 72). Thus, a defective charge is detrimental, leading to negative consequences on the right of the accused to defend himself and fair trial. It would be so in this case too, but with the amendment to the charge made by this court on its volition (see: s 158 of the CPC; *Public Prosecutor v James Tan* [1983] 2 MLJ 173) the consequent damage is mitigated, as the conviction and sentence meted out on him is for an offence of culpable homicide not amounting to murder punishable under s 304(b) of the PC, premised on the body of evidence available on the physical assaults inflicted by the accused on to the deceased, when she was alive, without an intention to cause death. Hence, the saving grace is the evidence tendered by the prosecution.

[50] Instantly, the accused has pleaded guilty to the amended charge tendered by the DPP for an offence under s 304(b) of the PC. The amended charge was first read and explained to the accused. After having understood the nature and consequences, the accused had admitted to the offence alleged against him without qualification by pleading guilty to the amended charge. He was then convicted for an offence of culpable homicide not amounting to murder punishable under s 304(b) of the PC. After hearing the plea in mitigation by the accused and submission on aggravating factors by the DPP, and weighing them accordingly and considering seriousness of the offence;

death of the accused's wife; as well as the deterrent aim of sentencing in protecting public interest, so that the accused repents and will not commit the offence again; also hope future offenders be deterred from committing such offences; as well as the rehabilitation aim of sentencing for the accused person to reflect on his folly and misdeed to his wife during incarceration; this court has sentenced the accused to imprisonment for a period of 10 years which is to take effect from the date of his arrest on 12 January 2018. The sentence passed is according to law, and it is the maximum allowed under s 304(b) of the PC. Sequentially, the proceeding pursued with, is the following:

TPR — kemukakan pertuduhan pindaan dibawah seksyen 304(b) KK. Pertuduhan pindaan telah dibaca kepada tertuduh. Tertuduh mengaku salah. Hukuman telah diterangkan. Tertuduh masih mengaku salah. Pertuduhan pindaan ditandakan sebagai P29.

PB — rayuan hukuman —

1. Umur 41 tahun masa kejadian.
2. Bekerja sebagai buruh kasar — gaji RM800 sebulan.
3. Telah berkahwin — 4 orang anak — 18 tahun, 15 tahun, 13 tahun dan 10 tahun.
4. Anak-anak tinggal dengan nenek.
5. Pesalah pertama — disahkan oleh TPR.
6. Laporan polis — D1 — 48/2018 — laporan dibuat pada tarikh kejadian — 12.1.2018 — kejadian berlaku kerana provokasi — isteri alami penyakit sawan — tidak ada apa-apa senjata digunakan.
7. Tindakan provokasi — pergelutan telah berlaku — kerana telefon bimbit.
8. Telah bawa isteri untuk terima rawatan ke hospital.
9. Tidak ada keganasan dalam kes ini.
10. OKT kesal dan insaf — mohon peluang pertama — telah mengaku salah — jimat masa kesemua pendakwaan.
11. Representasi telah dibuat — tetapi telah ditolak — mahkamah telah membuat keputusan untuk pindaan pertuduhan.
12. Telah direman sejak tarikh tangkap — 12.1.2018.
13. Kes *PP v Fernando* dirujuk — hukuman 2 tahun dikenakan — tiada rancangan, tiada tindakan agresif dilakukan.
14. Mohon hukuman penjara — dalam lingkungan 5 tahun dari tarikh tangkap. Supaya dapat jumpa anak-anak dia dan beri kasih sayang. Dalam penjara selama 3.5 tahun.

TPR —

1. Fakta kes adalah seperti kes pendakwaan.

2. Telah ada 3 orang doktor — si mati ada alami kecederaan.

3. Sumbang oleh tertuduh — menumbuk, terajang simati — ada menolak si mati — si mati mengalami sawan.

4. Siri kecederaan telah menyebabkan kematian.

5. Pertengkaran antara suami isteri.

6. Harus tidak menyebabkan kecederaan kepada si mati. Sepatutnya lebih rasional.

7. Anak telah melihat kejadian tersebut.

8. Walaupun ada kayu — tidak ada keterangan yang kayu tersebut digunakan.

9. Satu nyawa telah hilang — tidak akan kembali lagi — isteri tertuduh — adalah ibu kepada anak-anak.

10. Satu hukuman yang setimpal perlu dijatuhkan — fakta bahawa simati telah meninggal dunia perlu diambil kira.

11. Faktor kepentingan awam perlu diambil kira. Kes Muthu Subramaniam dirujuk.

12. Fakta dan keadaan kes perlu diambil kira.

13. Bagi kesalahan dibawah seksyen 304(b) — maksimum 10 tahun penjara.

14. Berada dalam reman sejak 12.1.2018. Hukuman yang rendah dari reman tidak setimpal. Mohon hukuman yang setimpal.

Untuk keputusan mengenai hukuman.

Setelah meneliti hujahan ringanan hukuman dan hujahan TPR berkenaan isu-isu pemberat hukuman, mahkamah berkeputusan —

1. Perkara pokok adalah kehilangan nyawa mangsa. Walaupun tidak ada keterangan muktamad bahawa mangsa telah meninggal dunia akibat pukulan oleh tertuduh, tetapi tertuduh tahu akan faktor kesihatan mangsa yang menghadapi penyakit sawan.

2. Dengan itu hukuman setimpal adalah wajar.

3. Sehubungan dengan itu, mahkamah memerintahkan hukuman pemenjaraan selama 10 tahun berkuatkuasa dari tarikh tangkap iaitu 12.1.2018.

[51] At point of continuation of trial and decision, I was the judicial commissioner at the High Court at Taiping, Perak.

Accused convicted and sentenced on a lesser charge for an offence of culpable homicide not amounting to murder under s 304(b) Penal Code.

Accused convicted on lesser charge of culpable homicide not amounting to murder under s 304(b) of the Penal Code and sentenced to ten years imprisonment.

Reported by Nabilah Syahida Abdullah Salleh